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[Lord STONEFIELD Reporter]

November 17. 1770.

INFORMATION

FOR

WILLIAM INNES of Sandſide, Defender,

AGAINST

LAUCHLAN DUFF, Writer to the Signet, Purſuer.

MR DUFF, as factor for Lady Fife and her huſband, brought a proceſs before this court againſt the defender, founded on the following grounds of debt:

1*ſt*, A bill drawn by the late Earl of Caithneſs, dated 7th July 1746, and accepted by William Innes of Sandſide, the defender's uncle.

2*d*, Cautionary miſſive or obligation, dated 28th September 1758, the late Harry Innes of Sandſide, the defender's father, to the Earl of Caithneſs's factor, for William Mein and John Simpſon, of the following tenor:

" I received a copy of your charge on the Earl of Caithneſs's ac-
" count, againſt *William Mein* lately removed from Dounreay,
" amounting to L. 524: 19: 10 Scots, rent, crop 1758 included;
" and alſo, of your charge againſt *John Simpſon* lately removed from
" Auchinebeſt, amounting to L. 89: 9: 6 Scots, beſides five bolls
" one firlot bear, and two firlots one peck meal-multure, for crop
" 1758: *And I hereby oblige myſelf as cautioner for theſe ſums, which*
" *I ſhall ſee paid upon demand, after the uſual terms of payment are*
" *elapſed.* and for the above quantity of victual, without giving the
" Earl any further trouble about the matter, providing theſe men
" ſhall be allowed to carry away their crops, now on the ground,
" whenever they pleaſe, without any impediment; and anent this,
" you will pleaſe give proper orders to all concerned, that I may
" cauſe

" cauſe ſecure, in ſome proper way, and in due time, as much of " theſe crops as will indemnify myſelf."

" Send Harry, firſt conveniency, *with my obligation to John Camp-* " *bell's laſt rent, to be retired*, and I will give him the balance due " of it over the draught, which I lately gave Mr Doull *per* your or- " der in payment; and that there may be no diſpute about John's " preſent crop, *ſend me alſo a note of his current rent, and arrears, if* " *any be, that I may give you an obligation for it, ſo far as he ſhall not* " *leave corns on the ground.* He is to leave as much corn and ſtraw " as he got, beſides what may maintain what cattle he may bring " in winter to carry his victual to the mill; and this is all he is " bound by his tack, or in equity, to leave, whatever occaſion " William Baillie may have for more ſtraw, which, by the bye, I " believe, may be very little: Therefore pleaſe give order likewiſe " that no ſtop be put to ſaid John Campbell's carrying away his " corns; for if he ſhould carry away more than enough, which I " have expreſsly diſcharged, I will oblige him to put back what will " make the full quantity of ſtraw he ſhould leave."

3*d*, Cautionary miſſive, the ſaid Harry Innes to the ſaid factor, dated 23d November 1758, as follows:

" I have your ſtate of John Campbell in Borlum's account with " the Earl of Caithneſs, of this date, which I have read to John " himſelf, making the balance of his arrears to my Lord for crop " 1758, and precedings, the ſum of L. 901, 7 s. Scots money—— " *John ſays, that the horſes charged at L.* 40 *Scots, as ſold to him by* " *my Lord, were diſeaſed horſes, which my Lord ordered to be given* " *him, becauſe he had ſuſtained loſs in his own horſes, and that he heard no* " *price propoſed for them; that one of them died ſoon after he got them, and* " *none of them turned out of any uſe to him; and that he underſtood them* " *intended as a preſent to him, on account of his other loſſes.*—And he " further ſays, that he is to give in *a note of ſtone-work he built in* " *Burrowſtown, as it ſhall be compriſed*, which he hopes my Lord will " allow him the value of, as he had no long poſſeſſion of the place, " and happened to loſe ſo conſiderably on it in his cattle.—I told him, " he behoved only to mention theſe things to my Lord, *referring them* " *to his Lordſhip's own juſtice*, and I hereby oblige myſelf to ſee his " Lordſhip paid of the above arrears accordingly. I have no doubt " but my Lord will allow the neceſſary time to convert the preſent " crop into money; *and as the bulk of John's crop is left in Burrowſ-*

" *town*,

" *town, that William Baillie, the preſent poſſeſſor, may have the ſtra-*
" *my Lord's doers are to order, that ſaid Baillie account regularly for the*
" *victual of each ſtack proveſt, before he be truſted with the handling of an-*
" *other; for John is not ſatisfied much with his credit in this particular.*"

Lady Fife, as executrix to her father the late Earl of Caithneſs, inſiſted, in the name of her factor, before Lord Stonefield, againſt the defender, as repreſenting his predeceſſors, for payment of the ſums ſpecified in the bill, and cautionary obligations above mentioned; and the Lord Ordinary, upon hearing counſel for the parties, decerned for the ſum in the bill, but aſſoilzied from the claim founded on the two miſſive letters. Dec. 7. 1769.

Both parties repreſented againſt this interlocutor; and as the defender was but juſt arrived at majority, and entirely unacquainted with his affairs, and reſided for the moſt part in England, he applied to ſome of his friends to make a diligent ſearch among his papers to ſee if any evidence could be found of theſe grounds of debt being paid, or diſcharged. For as the Earl was very ſtrict and diligent in calling in his debts, there was the greateſt reaſon to believe, that the vouchers of debt now founded on were mere clampers, owing entirely to the inattention of the defender's uncle and father, in not getting them retired when paid.

Accordingly in this ſearch were found two miſſive letters, one from Lord Caithneſs, another from his factor, acknowledging payment of the ſum in the bill purſued on, and promiſing to retire the ſame; but with reſpect to the ſums in the cautionary miſſives, as the payment of theſe fell, in the firſt place, to be demanded from the principal debitors, ſo any vouchers of payment would be given to them; and all that Sandſide could learn from their heirs, was, that they were not owing Lord Caithneſs a penny. March 5. 1747.

Upon recovering theſe vouchers of payment as to the bill, the Lord Ordinary aſſoilzied the defender as to this article; and, upon adviſing memorials as to the other points, made aviſandum therewith to the Lords, and ordered parties to give in informations; in obedience to which this is humbly offered on the part of Sandſide, the defender. July 5. 1770. Aug 2. 1770.

It will be obſerved by the Court, that the only queſtion now between the parties, reſpects the cautionary miſſives; Whether this action is properly brought upon theſe, or whether they are any vouchers of debt, either againſt Sandſide, or againſt Mein, Simpſon and

and Campbell, late tenants to Lord Caithneſs, on whoſe account theſe letters were granted?

The *ſpecies facti*, as appears from theſe miſſives, ſeems to be, that the late Sandſide had patronized the above tenants, and on different occaſions had been their cautioner for their rents to Lord Caithneſs; for by the firſt miſſive of the 28th September, Sandſide is deſiring that a former obligation for John Campbell's rent might be ſent him, ſo as he might pay up the balance: and theſe miſſives, purſued on, were granted for the rents that year the tenants left their poſſeſſions, with the view that they might have a power of carrying away, and diſpoſing of their crops; and there can be no doubt that Sandſide was no more but in the character of cautioner for what rents they ſhould be due, and it is ſo expreſsly ſet forth in the miſſives: "*I* "*hereby oblige myſelf, as cautioner for theſe ſums, which I ſhall ſee* "*paid upon demand, after the uſual terms of payment are elapſed.*"

This miſſive alſo contains a proviſion, that the tenants ſhould be allowed to carry away their crops, and that proper orders ſhould be given thereanent; ſo as Sandſide might ſecure himſelf, and then he was to be bound particularly for John Campbell's rent, "*ſo far as* "*he ſhall not leave corns on the ground.*"

This was not in *proprio facti* of the preſent defender; and he knows nothing, with the leaſt certainty, how far the conditions of this miſſive were complied with, whether ever it was accepted of as a ſecurity by Lord Caithneſs, or what corns might be left by John Campbell on the ground, for ſatisfying the Earl's demands; therefore, at all rates, it would be incumbent on the purſuer to clear theſe matters up by proof.

Beſides, from the miſſive of the 23d November, 1758, it appears, that John Campbell was objecting to my Lord's claims againſt him, and had ſome counter-claims againſt the Earl, which, as Sandſide expreſſes it, were to be referred to his Lordſhip's own juſtice; but it is ſpecially ſet furth, that the bulk of John's crop was left upon Burrowſtown, his old poſſeſſion, and that Baillie, the incoming tenant, was to have the ſtraw; but then there is a particular proviſion, that Baillie, and the Earl's doers, were to account for each ſtack proof, before intromitting with another; and ſo far as the defender can learn, Baillie, and my Lord's doers, intromitted with the whole of theſe corns, and for which no account was ever rendered to John Campbell; ſo that, abſtracting from his other claims, recited in the miſſives, which were to be referred to the Earl's own juſtice, it was

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in every view incumbent upon the Earl to have accounted to John Campbell for the intromiſſions had by Baillie and his Lordſhip's doers with Campbell's corns, which moſt probably would have overpaid the L. 901, 7 s. Scots, contained in the miſſive, and now purſued for.

This defence would have been competent to Campbell, if the Earl had recently intented action againſt him for payment of the rent, and it doth obviouſly ariſe, *ex facie*, of the cautionary miſſives themſelves.

But the defender, in the *ſecond* place, humbly ſubmits to the Court, how far this action, founded upon thoſe cautionary miſſives, when the bill is now out of the field, can at all be ſuſtained, or is competent; for it cannot be diſputed that the late Sandſide was only cautioner for theſe tenants, or bound to ſee the debt paid; therefore, like every other cautioner, he was entitled to demand that the principals ſhould be firſt diſcuſſed, or at leaſt that the purſuer ſhould ſhow, that any ſuch debts as now claimed were due by the principals; for, from the very ſhowing of the obligation upon which the claim is founded, and from ſeveral other circumſtances attending the caſe, there is the greateſt reaſon to believe that no ſuch debts are juſtly due.

3*dly*, Though no objection lay to the action itſelf, and though the debt now claimed was due by the principal debitors, yet as the defender's father was unqueſtionably no more but a cautioner, which his obligatory miſſives expreſsly bear, as this demand was not made againſt him or his heirs till upwards of ten years after the dates of the obligations, it therefore fell under the ſeptennial preſcription, introduced by the act 1695, for relief of cautioners.

It was anſwered by the purſuer to this objection, that theſe miſſives were not granted for money lent, but for arrears of rent due before the miſſives were written; ſo that they did not fall under the ſtatute, as was decided in the 1742, *Cave* againſt *Spence*, where a ſeparate and poſterior obligation, granted by David Spence, obliging himſelf either to pay a certain ſum of money, or to cauſe the debitor in a prior original bond pay it, was found not to come within the meaning or intendment of the act.

But the defender humbly apprehends this has no ſimilarity to the preſent queſtion; becauſe, in that caſe, it was a new bond granted by Spence, wherein he was the principal, nay, the ſole party; and he does not aſſume the deſignation of cautioner, but takes the debt ſole-

ly upon himſelf, and becomes either bound to pay it, or to cauſe another pay it.

It may further be obſerved in point of fact, that in this caſe, the rents for which Sandſide became bound, or at leaſt ſome part of them, were not exigible, nor were the uſual terms of payment come; and there can be no doubt that whatever theſe tenants were owing to Lord Caithneſs, Sandſide and they might have been purſued conjunctly and ſeverally therefor.

It was further urged by the purſuer, that the act 1695 was a correctory law, and therefore not to be extended beyond the caſes meaned and expreſſed in it.

But the defender humbly apprehends that the ſtatute 1695 may be more properly denominated a remedial law, from the obvious intention of the act, and from the very rubric or introductory words thereof: the legiſlature is expreſsly providing a remedy for the facility of mankind, to prevent their ruin, when they ſhould happen to be induced to enter into cautionary obligations for their friends and acquaintances; therefore, according to the opinions of all lawyers, ſuch ſtatute ought to receive a liberal interpretation, and to be ſo applied, as to ſtrike againſt every ſpecies of miſchief it was introduced to prevent.

Cautionary obligations that imply *a tractum futuri temporis, ad facta præſtanda*, or the like, cannot in good ſenſe fall under the ſtatute; for the creditor in the obligation muſt always be *valens agere*: but when the obligation is for a certain ſpecific ſum of money, and that can inſtantly be exacted, the defender cannot, with great ſubmiſſion, diſcover the leaſt reaſon for diſtinguiſhing this from any conjunct bond or contract whatever.

But, in the *laſt* place, The defender does humbly contend, that all action is in this caſe cut off againſt both principals and cautioner, by the act 1669, cap. 9. which ſtatutes and ordains, "That maills "and duties of tenants not being purſued within five years after "the tenant ſhall remove from the lands for which the maills and "duties are craved, ſhall preſcribe in all time coming."

It was anſwered to this, That the act 1669 only eſtabliſhed a preſcription with reſpect to the mean of proof, but ſtill the bygone rents can be eſtabliſhed either by the writing or oath of party.

It is no doubt competent by the act, after the five years, to prove reſting and owing by the defender's oaths, but it is not underſtood what the purſuer means to prove by writing; for ſure a written

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tack, nor no obligation relative thereto, can have the leaſt effect in this way. The law preſumes that a proprietor will call in his rents within five years, or commence a proper action for payment; therefore every obligation granted as for rent, or while the debt remains under that denomination, muſt, if not demanded within five years, unqueſtionably preſcribe in terms of the ſtatute.

Had the late Sandſide been bound in the very tack with the tenants, the obligation upon him for each term's rent muſt have preſcribed in five years; and why any relative cautionary obligation, to ſee ſuch rents paid, ſhould continue longer in force againſt the cautioner, when no action lyes againſt the principal, the defender cannot ſee the leaſt reaſon: nay, it appears to him, with ſubmiſſion, in the nature of things ſimply impoſſible, becauſe the preſumption of the ſtatute is, that the rents are ſatisfied and paid by the tenant; and therefore it is of the nature of a diſcharge and exoneration, granted by the law to the tenant, which being the caſe, it is impoſſible to demand againſt the cautioner what the principal is diſcharged of.

In the courſe of the proceedings before the Lord Ordinary, there was produced by the purſuer a miſſive from the defender to Mr Duff, dated 8th July 1766, in anſwer to one to the defender, in which Mr Duff had informed, that Lord Caithneſs had the late Sandſide's obligatory miſſive; and the defender, who was then a minor, and knew nothing about the matter, remitted Mr Duff to the defender's mother, and one of his curators, for payment, and promiſed to write to his agent anent it; but no argument hath hitherto been founded on this miſſive, nor can the defender ſee that it will afford the leaſt ſhadow of argument. The application to him then under curatory was improper; the claim was even then preſcribed; but as Mr Duff mentioned having the late Sandſide's obligation without explaining the cauſe, the defender had no notion but that the claim was juſt and unexceptionable, in which caſe his mother and agent would have ordered payment of it. *Arrd.?*

In reſpect whereof, &c.

DA. ARMSTRONG.

Alexander